

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 15, 2007 Session

DANIEL ALEXANDER ANNEAR v. KARA GABRIELLE CLOUSE

**Direct Appeal from the Circuit Court for Sullivan County
No. C36738(L) Hon. Richard E. Ladd, Circuit Judge**

No. E2006-02120-COA-R3-CV - FILED OCTOBER 15, 2007

In this divorce action the Trial Court designated the mother as the primary residential parent of the parties' minor child. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and SHARON G. LEE, J., joined.

H. Wayne Graves, Johnson City, Tennessee, for appellant.

Raymond C. Conkin, Jr., Kingsport, Tennessee, for appellee.

OPINION

The parties were married on February 14, 2001 and one child, Elowyn, had been born to the parties. The couple separated in 2003, and a complaint for divorce was filed by the husband in 2006. Pursuant to the local Rules of Practice in the Sullivan County Courts, the husband attached a proposed Temporary Parenting Plan, which proposed the husband as the parent responsible for the child and that the wife would be responsible for the child on Wednesdays from 5:00 p.m. to Thursday at 8:00 a.m. and on Saturdays from 8:00 p.m. to Monday mornings at 8:00 a.m. The Plan also proposed that the wife pay temporary child support in the amount of \$335.00 a month to the

husband. The Trial Court entered an *ex parte* order adopting the proposed Temporary Parenting Plan on March 31, 2006, and on May 11, 2006 the wife filed an answer and counter complaint, to which she attached a parenting plan which proposed that she be designated the primary residential parent, and that the husband pay child support in the amount of \$742.00 a month, based on his alleged monthly income of \$4,000.00.

On June 26, 2006, the wife filed a motion to suspend the child support obligation on the ground that she was currently unemployed and could not afford the monthly payments as required in the Temporary Parenting Plan. The record does not indicate that the Trial Court considered the wife's motion pretrial or at the trial.

On August 7, 2006, the husband filed a request with the Court to relocate with the child to McMinnville, Tennessee. The record does not indicate that the Court considered or ruled on the request for permission to relocate with the child.

The case was tried on August 14, 2006, and the parties stipulated to the grounds for divorce and to the fact that there were no property or debt issues for the Court to decide. Following the evidentiary hearing, the Trial Court granted an absolute divorce to both parties on the stipulated grounds of inappropriate marital conduct, and stated that based on the facts and law it was in the best interest of the child for the wife to be the primary residential custodian. The husband was granted visitation every other weekend, six weeks in the summer, and part of the winter and spring breaks. The Judgment which was approved by both parties' attorneys, did not address the child support issue associated with the Temporary Parenting Plan or the husband's motion regarding his relocation.

The Final Judgment was entered on August 31, 2006, and the husband was required to pay child support in the amount of \$671.18 a month. On September 21, the husband filed a motion to alter the decree, and asked that the husband be credited for his child support obligation by the amount that the wife had not paid in the Order of Temporary Support entered at the time his action was filed. He also asked that the child support order be recalculated. The Hon. E.G. Moody acted on his Motion¹ and ruled that the Motion should be sustained by the agreement of the parties relative to the monthly child support obligation which altered the final decree to reflect the child support obligation of \$632.00 a month. The Court then ruled "other matters in the motion are overruled". The husband has appealed.

The issues on appeal are:

1. Whether the plaintiff father should be designated as the primary residential parent of the minor child.
2. Whether the father should have been allowed to relocate with the minor child.

¹Judge Ladd retired September 1, 2006.

3. Whether the Court should have enforced the mother's child support obligations under the temporary parenting plan.

Our review of the factual determinations made by the Trial Court are a *de novo* review upon the record accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). *Brooks v. Brooks*, 992 SW2d 403, 404 (Tenn.1999).

Trial courts have broad discretion in determining custody and visitation issues. In reaching such decisions the courts should consider the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999). The court's paramount concern in a custody case is the welfare and best interest of the child. *Parker* at 562. Custody and visitation decisions "often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings" and the appellate courts "are reluctant to second-guess a trial court's decisions." *Johnson v. Johnson*, 165 S.W.3d 640, 645 (Tenn. Ct. App. 2004). Moreover, it is not the function of an appellate court to "tweak" parenting plans with the hope of achieving a more reasonable result. *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

Tennessee Code Annotated section 36-6-404(b) sets forth the factors the court shall consider when providing a residential schedule as part of a permanent parenting plan. The first factor requires the consideration of the love, affection and emotional ties between the parents and the child. Elowyn is a fortunate child as she has two parents who love her and want to provide a safe and stable home for her. Both parents testified they love the child and have a good relationship with her, and most importantly, they both testified they have no doubt that the other parent loved the child.

The second factor looks to the disposition of the parents to provide the child with necessities. Although there was some contradictory testimony from the parents, the record shows that both parents were involved in this aspect of the child's care and were both adequate or better than adequate.

The issue of who had been the primary caregiver is disputed by the parties. The husband went to great lengths to establish that he was the child's primary caregiver before and after the separation and that the child had spent the majority of her time after the separation with him. However, based upon the parents' testimony, the child and the wife lived together without the husband intermittently for 15 months from the child's birth in 2001 to March of 2005. Additionally, she spent most of September, October and November of 2003 with the wife when the husband was living with his grandmother in Chattanooga. The mother testified that the child's time was split between the parties essentially equally until the time the husband moved to Kingsport in March of 2005, and both parties agree that once the husband moved to Kingsport the child spent 4 days a week with her father and 3 days a week with her mother until the temporary parenting plan was put in place in April of 2006. The evidence tends to favor the mother on this factor.

Another factor requires consideration of continuity in the child's life and the length of time the child has lived in a stable environment. The child has lived in Kingsport since May of 2003, and since March of 2005, when the husband moved to Kingsport, the child has had a very stable environment, dividing her time between her parents' homes in Kingsport on a regular basis. The husband's move to McMinnville (239 miles from Kingsport) would cause a change in the child's environment, and this factor weighs in favor of the mother who will remain in Kingsport.

As to the next factor, the wife has the support of a number of family members, including her sister and father and friends in Kingsport. She stated that she had a dozen people she could call on for immediate help with the child, if necessary. The husband did not know anyone in McMinnville except the coworkers he had recently met. His support group, includes his grandparents, his younger brother and two male friends and their wives all who live in Chattanooga. The husband was apparently estranged from his twin brother and not on good terms with his mother. This factor favors the wife.

Looking at all of the factors as a whole and applying the best interest analysis provided by Tennessee Code Annotated section 36-6-106, either parent would be acceptable as the primary residential parent for the child. The Trial Court, however, had to make a choice and designated the wife as the primary residential parent. The parents' testimony differed on some key points, but the Trial Judge was able to observe the parents demeanor and manner at trial, found the wife to be the more credible witness as to the factors, and when the outcome of a case hinges on the truthfulness of the witnesses, the trial judge is in the best position determine their credibility. "The weight, faith and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court." *Lee v. Lee*, 66 S.W.3d 837, 851 (Tenn. Ct. App. 2001). We affirm the Trial Court's decision designating the wife as the primary residential parent, which was in the best interest of the child.

As to the next issue, one week before trial, the husband filed his motion requesting leave of the Court to relocate with the child to McMinnville. The motion does not set forth when he planned to relocate.

On appeal, the husband asserts that the Trial Court should have granted his motion and allowed him to relocate to McMinnville, Tennessee with the child pursuant to Tennessee Code Annotated section 36-6-108. This section applies when a parent who is "spending intervals of time" with a child seeks to relocate outside the state or more than one hundred miles from the other parent within the state. Tenn. Code. Ann. § 36-6-108(a). If the parents spend "substantially equal intervals of time" with the child and the parent seeking permission to relocate wants the child to relocate also, the court must determine whether the relocation is in the child's best interest. Tenn. Code Ann. §36-6-108(c); *Kawatra v. Kawatra*, 182 S.W.3d 800, 802 (Tenn. 2005). The husband further asserts that because he was responsible for the child four days out of the week for the year preceding the divorce, the Court should have granted his motion to relocate pursuant to Tenn. Code Ann. 36-6-108(d).

Tennessee Code Annotated section 36-6-108 does not require that the parents be

divorced or that a prior custody determination or a permanent parenting plan be in place designating a primary residential parent.² The only case we have found that considered the application of Tennessee Code Annotated section 36-6-108 to the initial determination of custody and primary parent designation is *Gregory v. Gregory*, No. W2002-01049-COA-R3-CV, 2003WL21729431 (Tenn. Ct. App. July 14, 2003). *Gregory* is factually similar to this case and is instructive. In *Gregory*, the father filed for a divorce against the mother and asked for joint custody of the minor child. The mother sought sole custody. Soon after the petition for divorce was filed the mother received a promotion and was required to move from Tennessee to Texas. The trial court applied a best interest of the child analysis and awarded the father primary custody rights. The mother appealed, and the issues on appeal were framed as: “[w]hether the trial court erred in applying a best interest of the child analysis under Tennessee Code Annotated section 36-6-106, and whether the trial court erred in failing to apply the factors enumerated in Tennessee Code Annotated section 36-6-108(d)”. That court held that the best interest of the child analysis under section 36-6-106 was the correct approach to determine custody. Following the reasoning in *Gregory*, the husband’s assertion that the trial court should have determined the designation of the primary residential parent under the relocation statute, Tennessee Code Annotated section 36-6-108(d), and not under the child custody statute, Tennessee Code Annotated section 36-6-106, must fail. The Trial Judge addressed the reason for his designation of the wife as the primary residential parent, and said: “I find it’s in the best interest of the child that the child’s mother be the primary residential custodian”. Accordingly, we hold the Trial Court correctly applied the best interest of the child analysis after he rejected the application of Tennessee Code Annotated section 36-6-108(d) to the initial determination of child custody.

Finally, the husband argues the Trial Court erred in not addressing the issue of the mother’s failure to honor her child support obligation under the Temporary Parenting Plan. The record demonstrates that the Trial Judge never expressly ruled on the wife’s motion regarding child support. Significantly, there is no evidence that the husband ever sought relief from the Court in pleadings or at trial by asking that the wife be ordered to pay the child support arrearage, and the husband testified that he was not concerned about the wife’s failure to pay child support: “. . . I understand that she’s unemployed and I honestly don’t need it. We only put that on the divorce because it was required by the State of Tennessee. . . . Given the present circumstances, I think the money would be better put to use either to put herself through Pharmacy School and to maintain her car and fuel costs for driving to Knoxville for weekend visitations.” We hold that the record before us supports the conclusion that the husband, by his failure to pursue this issue at trial, effectively abandoned his earlier assertion he was entitled to relief regarding the mother’s alleged failure to pay child support. He in effect waived this issue on appeal by his position at trial. *See* Tenn. R. App. P. 36a. We find this claim to be without merit.

²*See, Kawatra*, 182 S.W.3d at 801; *Edgeworth v. Edgeworth*, No. W2006-01813-COA-R3-CV, 2007 WL2403356 at *1 (Tenn. Ct. App. Aug. 23, 2007); *Dye v. Fowler*, No. M2006-01896-COA-R3-CV, 2007WL1515140 at*1 (Tenn. Ct. App. May 23, 2007); *Calmelet v. Eluhu*, No. M2005-01981-COA-R3-CV, 2006 WL2091385 at *1 (Tenn. Ct. App. Dec. 27, 2006).

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to Daniel Alexander Annear.

HERSCHEL PICKENS FRANKS, P.J.